

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

77-1465

To be argued by
JAMES A. MOSS

United States Court of Appeals FOR THE SECOND CIRCUIT

Docket No. 77-1465

UNITED STATES OF AMERICA,

Appellee,

—v.—

DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado,
a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, LUIS
NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO,
a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man,
JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy,
FABIAN RODRIGUEZ, ANTONIO MORALES, a/k/a Tony the
Mechanic, ANTHONY RODRIGUEZ, a/k/a Little Tony,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JAMES A. MOSS,
RICHARD F. ZIEGLER,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

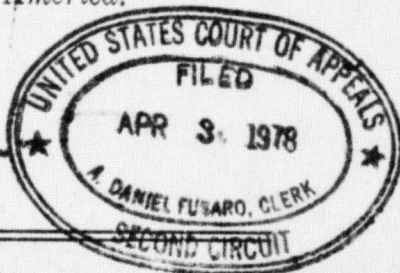


TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	4
A. Introduction	4
B. The Government's Case	5
1. The Origin and Development of The Gal- lardo Organization	5
2. The Heroin Suppliers	7
3. The Interplay between the Couriers and the Wholesale Distributors	8
4. The Distribution of Heroin by Benito Cruz in January, 1975	11
5. The Purchase of Heroin by Raymond Rossy and Raymond Valentine	12
C. The Defense Case	13
1. Domingo Zayas	13
2. Orlando Machado	14
3. Carlos Rivera Santiago	14
4. Jose Velasquez	15
5. Angelo Roche	15
6. Anthony Rodriguez	16
D. The Government's Rebuttal Case	16

ARGUMENT:

POINT I—The Evidence Established The Single, Mas- sive Heroin Distribution Conspiracy Charged In The Indictment	16
---	----

	PAGE
POINT II—The Defendants Were Not Prejudiced By A Joint Trial	21
POINT III—The Assistant United States Attorney's Summation Was Entirely Proper	28
POINT IV—Defendants' Other Claims of Error Are Meritless	33
A. The District Court and the Government Acted Properly to Cure a Misidentification of Orlando Machado	33
B. The Government Did Not Violate Its Dis- covery Obligations to Santiago	36
C. The District Court Properly Submitted a Copy of the Indictment to the Jury	38
D. The District Court Responded Properly to an Ambiguous Jury Note	40
E. The Sentences Imposed On the Defendants Were Proper	42
CONCLUSION	45

TABLE OF CASES

<i>Bollenbach v. United States</i> , 326 U.S. 607 (1946) ..	41
<i>Dorszynski v. United States</i> , 418 U.S. 424 (1974) ..	42
<i>Opper v. United States</i> , 348 U.S. 84 (1954)	22
<i>United States v. Arnedo-Sarmiento</i> , 545 F.2d 785 (2d Cir. 1976), <i>cert. denied</i> , 430 U.S. 917 (1977)	17, 19, 21, 24
<i>United States v. Aviles</i> , 274 F.2d 179 (2d Cir. 1960)	21
<i>United States v. Benter</i> , 457 F.2d 1174 (2d Cir.), <i>cert. denied</i> , 409 U.S. 842 (1972)	31, 32

<i>United States v. Bertolotti</i> , 529 F.2d 144 (2d Cir. 1975)	19, 20, 27
<i>United States v. Bolden</i> , 514 F.2d 1301 (D.C. Cir. 1975)	41
<i>United States v. Branker</i> , 395 F.2d 881 (2d Cir. 1968), <i>cert. denied</i> , 393 U.S. 1029 (1969) ..	27, 28
<i>United States v. Braunig</i> , 553 F.2d 777 (2d Cir.), <i>cert. denied</i> , 431 U.S. 959 (1977)	40
<i>United States v. Brown</i> , 479 F.2d 1170 (2d Cir. 1973)	42
<i>United States v. Bynum</i> , 485 F.2d 490 (2d Cir. 1973), <i>vacated</i> , 417 U.S. 903 (1974)	17, 20
<i>United States v. Corr</i> , 543 F.2d 1042 (2d Cir. 1976)	25
<i>United States v. DeSapio</i> , 435 F.2d 272 (2d Cir. 1970), <i>cert. denied</i> , 402 U.S. 999 (1971)	22
<i>United States v. Desist</i> , 384 F.2d 889 (2d Cir. 1967), <i>aff'd</i> , 394 U.S. 244 (1969)	41
<i>United States v. Estremera</i> , 531 F.2d 1103 (2d Cir. 1976)	33
<i>United States v. Gentile</i> , 525 F.2d 252 (2d Cir. 1975), <i>cert. denied</i> , 425 U.S. 903 (1976)	41
<i>United States v. Hockridge</i> , Dkt. No. 77-1243 (2d Cir., March 27, 1978)	40
<i>United States v. Indiviglio</i> , 352 F.2d 276 (2d Cir. 1965) (<i>en banc</i>), <i>cert. denied</i> , 383 U.S. 907 (1966)	40
<i>United States v. Jenkins</i> , 496 F.2d 57 (2d Cir. 1974), <i>cert. denied</i> , 420 U.S. 925 (1975)	35
<i>United States v. Magnano</i> , 543 F.2d 431 (2d Cir. 1976), <i>cert. denied</i> , 429 U.S. 1091 (1977)	17
<i>United States v. Marquez</i> , 424 F.2d 236 (2d Cir.), <i>cert. denied</i> , 400 U.S. 828 (1970)	39

	PAGE
<i>United States v. Miley</i> , 513 F.2d 1191 (2d Cir.), cert. denied, 423 U.S. 842 (1975)	18, 19-20
<i>United States v. Moten</i> , 545 F.2d 620 (2d Cir. 1977) 19, 20, 21, 22, 23, 24, 26	26
<i>United States v. Papadakis</i> , 510 F.2d 287 (2d Cir.), cert. denied, 421 U.S. 950 (1975)	25
<i>United States v. Pollak</i> , 474 F.2d 828 (2d Cir. 1973)	41
<i>United States v. Ramos</i> , Dkt. No. 77-1271, slip op. 1575 (2d Cir., Feb. 15, 1978)	42
<i>United States v. Ricco</i> , 549 F.2d 264 (2d Cir.), cert. denied, — U.S. — (1977)	32
<i>United States v. Robin</i> , 545 F.2d 775 (2d Cir. 1976)	42
<i>United States v. Santana</i> , 485 F.2d 365 (2d Cir. 1973), cert. denied, 415 U.S. 931 (1974)	33
<i>United States v. Schor</i> , 418 F.2d 26 (2d Cir. 1969)	40
<i>United States v. Stassi</i> , 544 F.2d 579 (2d Cir. 1976), cert. denied, 430 U.S. 907 (1977)	33
<i>United States v. Stein</i> , 544 F.2d 96 (2d Cir. 1976)	42
<i>United States v. Stirling</i> , Dkt. No. 77-1140, slip op. 1401 (2d Cir., Feb. 2, 1978)	17, 22
<i>United States v. Stromberg</i> , 268 F.2d 256 (2d Cir.), cert. denied, 361 U.S. 863 (1959)	21, 27
<i>United States v. Taylor</i> , 562 F.2d 1345 (2d Cir.), cert. denied, 97 S.Ct. 2958 (1977)	17, 21, 22
<i>United States v. Tramunti</i> , 513 F.2d 1087 (2d Cir.), cert. denied, 432 U.S. 832 (1975)	17, 21, 32, 33
<i>United States v. Variano</i> , 550 F.2d 1330 (2d Cir.), cert. denied, — U.S. — (1977)	27, 28

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 77-1465

UNITED STATES OF AMERICA,

Appellee,

—v.—

DOMINGO ZAYAS, a/k/a Luis Nunez, a/k/a Luis Machado,
a/k/a Luisito, ORLANDO MACHADO, a/k/a Julito, LUIS
NUNEZ-RAMOS, a/k/a Indio, CARLOS RIVERA-SANTIAGO,
a/k/a Carlitos, ANGELO ROCHE, a/k/a The Old Man,
JOSE VELASQUEZ, a/k/a Vaquero, a/k/a Cowboy,
FABIAN RODRIGUEZ, ANTONIO MORALES, a/k/a Tony the
Mechanic, ANTHONY RODRIGUEZ, a/k/a Little Tony,
Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

This is an appeal by nine defendants from judgments of conviction entered on September 19 and 23, 1977, November 1, 1977, January 13, 1978, and February 2, 1978 in the United States District Court for the Southern District of New York after a six-week trial before the Honorable Vincent L. Broderick, United States District Judge, and a jury.

Indictment 77 Cr. 100, filed on February 14, 1977, charged the nine appellants and fifteen other defendants in twenty-nine counts with various violations of the

federal narcotics laws.* Count One charged all twenty-four defendants with a conspiracy to violate the narcotics laws from October 1, 1973 through November 6, 1975, in violation of Title 21, United States Code, Section 846. Count Two charged defendant Fernando Gallardo as the manager of a continuing criminal enterprise, in violation of Title 21, United States Code, Section 848. Counts Three through Twenty-nine charged each of the defendants in certain counts with the distribution, and the possession with intent to distribute, of quantities of heroin ranging from one-eighth of a kilogram to twelve and one-half kilograms, in violation of Title 21, United States Code, Section 841(a) (1).

Trial commenced against the nine appellants and one other defendant, Jose Luis Iglesias, on May 23, 1977.** On July 1, 1977, the jury returned verdicts of guilty against the nine appellants on each of the counts in the indictment in which they were named. Judge Broderick imposed the following sentences, all of which were concurrent on each count and with other unexpired sentences:

* The indictment was sealed on February 14, 1977, and unsealed on March 3, 1977, after the arrest of eight of the nineteen previously unjailed defendants. The remaining eleven previously unjailed defendants were fugitives at the time the trial began on May 23, 1977. Of these eleven fugitive defendants, only one has been subsequently apprehended: Herminio Gutierrez, who pleaded guilty to Count Twenty-seven of the indictment on February 23, 1978. The other defendants who remain fugitives are Fernando Gallardo, Martha Machado, Hilda Gracia, Carlos Gallardo, Moises Maldonado, Gilberto Torres, Ricardo Tirado, Jose Luis Terson, Victor Medina and John Doe, a/k/a "Pumarejo."

** Three of the original thirteen defendants, Wilfredo Machado, Ricardo Garcia, and Luis Rodriquez, pleaded guilty prior to the start of the trial. Two of these defendants—Garcia and Rodriquez—testified at the trial as Government witnesses. Defendant Jose Luis Iglesias pleaded guilty on May 27, 1977, after the conclusion of opening statements.

<i>Defendant (Total Sentence)</i>	<i>Date of Sentence</i>	<i>Counts</i>	<i>Terms of Sentence</i>	
			<i>Incarceration</i>	<i>Special Parole</i>
1. Domingo Zayas (15 years)	September 19, 1977	1 26	15 years 15 years	6 years 6 years
2. Luis Nunez- Ramos (15 years)	September 19, 1977	1 7 18	15 years 15 years 15 years	6 years 6 years 6 years
3. Jose Velasquez (15 years)	September 19, 1977	1 5 9	15 years 15 years 15 years	6 years 6 years 6 years
4. Fabian Rodriguez (15 years)	September 19, 1977	1 20 22	15 years 15 years 15 years	6 years 6 years 6 years
5. Antonio Morales (15 years)	September 19, 1977	1 15	15 years 15 years	6 years 6 years
6. Angelo Roche (15 years)	September 23, 1977	1 4 8	15 years 15 years 15 years	15 years 15 years 15 years
7. Orlando Machado (9 years)	November 1, 1977	1 23	9 years 9 years	6 years 6 years
8. Anthony Rodriguez* (4 years)	January 13, 1978	1 27	4 years 4 years	6 years 6 years
9. Carlos Rivera Santiago (15 years)	February 2, 1978	1 18	15 years 15 years	3 years 3 years

All of the appellants are presently incarcerated and serving the sentences imposed in this case.

* Appellants Anthony Rodriguez and Carlos Rivera Santiago were originally sentenced on September 19, 1977 and October 5, 1977, respectively, to maximum prison sentences, pursuant to the provisions of Title 18, United States Code, Section 4205(c). Rodriguez and Santiago were resentedenced as indicated above upon the completion of 90-day medical and personality studies.

Statement of Facts

A. Introduction

The investigation and prosecution of this case brought to an end the operations of a widespread narcotics organization whose members were responsible for the distribution of hundreds of kilograms of Mexican "brown rock" heroin in New York City during the period from 1973 through 1975. The indictment and trial focused on the activities of the principal organizer of this narcotics enterprise, Fernando Gallardo, and those members of Gallardo's organization who were directly responsible, as couriers and wholesale distributors, for the sale of massive quantities of heroin. The evidence at trial established a direct line between importers of Mexican heroin in Los Angeles, California and couriers of the Gallardo organization who purchased this heroin in Los Angeles and flew it to New York City for further redistribution by Gallardo's regular cadre of wholesale distributors. Each of the appellants operated under the direct control of Fernando Gallardo, either as a courier, a wholesaler, or as both.

The Government's evidence presented through the testimony of fifteen witnesses, including six accomplices, and more than 120 exhibits,* established the following conspiracy: Gallardo personally or through his couriers—Ramon Rivera, Domingo Zayas, William Cortes-Rios, Wilfredo Machado and Orlando Machado—traveled to Los Angeles to purchase kilogram quantities of heroin from co-

* The Government corroborated the accomplices' testimony by offering as evidence numerous documents and other witnesses to establish that various hotels, apartments, telephones, and other facilities were used by members of the conspiracy, as testified to by the Government's witnesses.

conspirator Fernando Valenzuela and members of Valenzuela's organization. Machado and Zayas are two of the appellants in the instant appeal. The heroin was brought to New York by one of these couriers and distributed to Gallardo's wholesale distributors who would in turn distribute the heroin to other distributors in a chain which eventually led to the ultimate customer and user of the heroin. Among these wholesale distributors were seven co-defendants who are appellants in the instant appeal—Luis Nunez Ramos, Carlos Rivera Santiago, Angelo Roche, Jose Velasquez, Antonio Morales, Fabian Rodriguez, and Anthony Rodriguez. The defendants Ramos, Santiago, Roche, Velasquez, and Morales each received heroin from Ramon Rivera who in turn received the heroin from appellant Zayas or another conspirator. The defendants Fabian Rodriguez, Anthony Rodriguez, and Ramos received heroin either directly from Fernando Gallardo, or indirectly from him through his associate Benito Cruz.

B. The Government's Case

1. The Origin and Development of The Gallardo Organization

Throughout 1973 there was a drug "panic" in New York City: that is, the usually plentiful supply of white heroin available for distribution on the streets became scarce. (Tr. 2050-51).^{*} In late 1973 conspirator Jorge Vasquez agreed to take Fernando Gallardo and conspirator Benito Cruz to a source of "brown rock" heroin in

^{*} References to the trial transcript are abbreviated herein as "Tr."; to the Government's trial exhibits as "GX"; to the Appellant's Joint Appendix as "Jt. App."; to Appellants' Joint Brief as "Jt. Br."; to appellant Ramos' brief as "Ramos Br."; and to appellant Roche's brief as "Roche Br."

Los Angeles, California. In December 1973, Gallardo and Cruz jointly financed two trips to Los Angeles which were taken by Gallardo and Vasquez; during these trips Gallardo purchased a total of fourteen ounces of brown heroin. This heroin was eventually distributed in New York City to customers of Gallardo. (Tr. 2051-59). Having established a direct contact with the source of supply in California—conspirator Fernando Valenzuela—Gallardo began making trips to Los Angeles by himself, cutting Vasquez and, later, Cruz out of the venture. (Tr. 2060-62).

By the spring and summer of 1974, Gallardo had established an organization of persons who assisted him in distributing heroin in New York City. One of these persons was conspirator William Cortes-Rios who used the Manhattan social club of defendant Luis Nunez Ramos as his base of operations. (Tr. 2080-88).

During the latter part of 1974 and 1975, Gallardo relied upon his brother, Carlos, his wife, Martha Machado, several of his brothers-in-law, and William Cortes-Rios to "stash" heroin that was flown into New York City from California, as well as to count and "launder" the proceeds derived from the distribution of this heroin in New York City. (Tr. 232-33, 257-58, 311-12, 315-19, 328-29, 346, 368, 393, 398-400, 415-18, 425-26). At times Benito Cruz, William Cortes-Rios, Martha Machado and others assumed temporary responsibility for the operations of the organization—either because Gallardo delegated this authority to them (Tr. 2080, 2117), or because Gallardo was incarcerated on state criminal charges. (Tr. 409-10).

2. The Heroin Suppliers

Three Government witnesses—Ramon Rivera, Benito Cruz, and Raymond Rossy—testified that they had been taken to Los Angeles and were shown the method used to purchase heroin from Gallardo's suppliers in California. In each case the method of operation employed by the California suppliers was essentially the same.

Upon arriving in California, the Gallardo couriers, who included appellants Machado* and Zayas, checked into hotel rooms in the greater Los Angeles area, from which they would place telephone calls to (213) 625-0300 and order the amount of heroin they desired. (Tr. 221, 1345, 1349-50). If the purchase price for the heroin had been paid prior to the arrival of the couriers in California, the heroin would be delivered without delay to the couriers in their hotel rooms—usually by conspirators "Hector" Ramos-Tribe and "Humberto" Ramos-Serrano. (Tr. 223-24, 264, 323-25, 351, 370, 381, 1345, 1350-51, 2203-04). If the heroin had not been paid for in advance, "Hector" or "Humberto" would first pick up the payment from the courier at his hotel, and thereafter return with the heroin. (Tr. 224-25, 381-83, 1345-46, 1351, 2203-04).

The heroin that was supplied to the Gallardo organization in this manner was processed in the homes of the California suppliers by dissolving the unprocessed heroin into an acetone solution and baking the resulting mixture in ovens until dry. The processed heroin was then pack-

* Machado admitted when arrested that he had collected at times as much as \$60,000 of narcotics proceeds for Gallardo and Martha Machado (Tr. 1257), and that he, Gallardo, and Martha Machado had met in California and transported back to New York City approximately ten kilograms of heroin. (Tr. 1253-54, 1256-57).

aged in plastic bags in quarter-kilogram quantities and delivered to the Gallardo couriers. (Tr. 386-88).

3. The Interplay between the Couriers and the Wholesale Distributors

The evidence demonstrated that upon returning to New York City from Los Angeles with multi-kilogram quantities of heroin, couriers of the Gallardo organization "stashed" the heroin in apartments and hotel rooms in Manhattan. Thereafter, they would deliver the heroin on consignment in quarter and half-kilogram loads to a regular group of wholesale distributors. Thus couriers such as appellants Zayas and Machado would deliver heroin to other conspirators including Ramon Rivera and Benito Cruz who in turn would distribute the heroin to the other seven defendants tried with Zayas and Machado. This method of operation was explained in detail during the testimony of Ramon Rivera, who operated as a courier for Gallardo during the late summer and fall of 1974.*

Rivera was recruited into the Gallardo organization in August 1974 by his close friend, conspirator William Cortes-Rios. (Tr. 206-13). At Gallardo's direction, Cortes-Rios accompanied Rivera to Los Angeles and demon-

* Co-defendants Ricardo Garcia and Luis Rodriguez testified as Government witnesses and explained how they received heroin from either Rivera or Rivera's helper, defendant Jose Luis Iglesias. (Tr. 1192-99, 1280-85). Their testimony clearly corroborated Rivera's. The testimony of Rivera similarly was corroborated by Maria Sosa, an employee of a bank in Puerto Rico. Her testimony confirmed that of Rivera that Rivera and conspirator William Cortes-Rios exchanged hundreds of thousands of dollars of narcotics proceeds for interest-bearing savings certificates, which were kept in a safe deposit box at the Bayamon Federal Savings Bank. (Tr. 1145-54; GX 7A, 7B, 7C, 7D).

strated the procedure for purchasing heroin there. Cortes-Rios and Rivera returned to New York City with eleven quarter-kilogram packages of heroin. (Tr. 216-29). In New York City, Cortes-Rios introduced Rivera to several of the conspirators who regularly distributed Gallardo's heroin—including appellants Angelo Roche and Jose Velasquez. Conspirators such as Roche and Velasquez then would place orders for wholesale quantities of heroin and, in turn, would receive the requested amounts of heroin from Rivera on consignment. (Tr. 235-48, 250-53, 255-57).^{*} Within the next few days Rivera collected a total of \$88,000 from these distributors for this heroin. Rivera was paid \$7,000 for his efforts as a courier and returned the remaining \$81,000 to Gallardo. (Tr. 257-58).

In September 1974, Rivera made two solo trips to Los Angeles and returned with first fourteen and then sixteen quarter-kilogram packages of heroin. (Tr. 263-67, 321-27). Again Rivera distributed this heroin on consignment to certain of Gallardo's regular wholesalers—including appellants Luis Nunez Ramos, Angelo Roche, Jose Velasquez, Antonio Morales—and collected a total of over \$300,000 for this heroin. Rivera delivered the \$300,000 to Gallardo.^{**} Rivera received a combined commission of \$35,000 for these two trips. (Tr. 271-80, 294-313, 331-46).

^{*} The possession of these amounts of heroin by appellants Roche and Velasquez was the basis for the charges contained in Counts Four and Five of the indictment, respectively.

^{**} After his first trip to California in August 1974, Rivera enlisted the aid of defendant Jose Luis Iglesias, who assisted Rivera in distributing heroin to Gallardo's wholesale distributors and in collecting the payments for this heroin from those distributors. (Tr. 253-54, 258-60, 268-80, 294-307). The heroin that was distributed by Rivera and Iglesias to appellants Ramos, Roche, Velasquez and Morales following Rivera's second trip to California was the subject of the charges contained in Counts Seven, Eight, Nine and Fifteen of the indictment, respectively. An undercover police officer twice purchased several ounces of heroin from Velasquez during the summer of 1974. (Tr. 2459-68).

During October 1974, in accordance with instructions from Gallardo, Rivera made a special trip to Los Angeles and returned with 10 quarter-kilogram packages of heroin, which he gave to appellants Carlos Rivera Santiago and Luis Nunez Ramos for distribution. After enlisting the aid of defendant Jose Luis Iglesias to assist Santiago and Ramos in distributing this heroin, Rivera flew to Puerto Rico for a brief vacation. This vacation, however, was interrupted by telephone calls from Santiago and Iglesias, who both reported that a personality conflict between them was causing difficulty in their joint distribution of the heroin. Rivera made several telephone calls in an unsuccessful attempt to resolve this conflict; thereafter he returned to New York, met with Santiago, Ramos and Iglesias, and directed Santiago and Ramos to complete the distribution of the heroin by themselves. This was accomplished within a few days.* Rivera received \$5,000 from Gallardo for his part in the distribution of this heroin. (Tr. 347-69).

Rivera's fifth and final trip to California took place in the first week of November 1974. At that time he and Gallardo met with Gallardo's suppliers and exchanged a suitcase containing \$125,000 for approximately nine kilograms of Mexican heroin. (Tr. 281-83). Over the next three weeks Rivera filled the orders of Gallardo's regular distributors and disseminated all of this heroin. He eventually collected over \$200,000 from these distributors, which he passed along to William Cortes-Rios, Fernando Gallardo, and Carlos Gallardo. (Tr. 392-93).

In the course of the following six months, Rivera continued to work in the Gallardo organization as a middle-

* The distribution of these quarter-kilogram packages of heroin by appellants Santiago and Ramos and defendant Iglesias in October 1974 is the basis for the charge contained in Count Eighteen of the indictment.

man, receiving heroin from those conspirators who succeeded him as couriers and putting this heroin into the hands of Gallardo's regular corp of distributors. Among the couriers who succeeded Rivera were appellants Orlando Machado * and Domingo Zayas,** and defendant Wilfredo Machado, all of whom are brothers-in-law of Gallardo. (Tr. 397, 401-08, 418-25, 2180-90). During this period, Rivera collected approximately \$500,000 from the wholesale distributors for the heroin he delivered to them. These proceeds were, in turn, passed along directly to Gallardo's wife, Martha Machado, his brother Carlos, and another defendant identified only as "Pumarejo." (Tr. 425-27). In May 1976, Rivera left the Gallardo organization to return to Puerto Rico, where he was arrested for an unrelated narcotics transaction. (Tr. 427).

4. The Distribution of Heroin by Benito Cruz in January, 1975

In December 1974, Gallardo prepared Benito Cruz to assume temporary control of the distribution of heroin within Gallardo's organization. (Tr. 2121-22). During that month Cruz accompanied Gallardo while the latter received payments of \$25,000 and \$50,000, respectively, from appellant Ramos and defendant Gilberto Torres.

* Orlando Machado flew to Los Angeles in January 1975 and returned in the company of Gallardo and Martha Machado with twelve and one-half kilograms of heroin. For his role in this trip, Orlando Machado received \$4,600. (Tr. 2180-90). His possession of this heroin formed the basis for the charge contained in Count Twenty-three of the indictment.

** In February 1975, Zayas twice brought three and one-half kilograms of heroin from Los Angeles to New York. (Tr. 419-25). His joint distribution with Rivera of the first shipment of this heroin was the basis for the charge contained in Count Twenty-six of the indictment.

(Tr. 2109-14). Cruz was also present when Gallardo delivered one and one-quarter kilograms of heroin to appellant Fabian Rodriguez and defendant Torres. (Tr. 2118-20).*

In January 1975, Cruz assumed control of Gallardo's business for a period of approximately two weeks. During this time he distributed seventeen kilograms of heroin valued at \$850,000 to the regular customers of the Gallardo organization, including appellants Ramos, Fabian Rodriguez and Anthony Rodriguez. (Tr. 2126-32, 2163-78).** This heroin had been delivered to New York City from California in two separate trips by appellant Orlando Machado and defendants Gallardo, Martha Machado and Wilfredo Machado. (Tr. 2180-90). Cruz received from Gallardo a commission of approximately \$50,000 for his activities in January 1975. (Tr. 2179).

5. The Purchase of Heroin by Raymond Rossy and Raymond Valentine

In February 1975, government witness Raymond Rossy was unable to obtain heroin from his regular source of supply and instead purchased heroin twice from the Gallardo organization. These two transactions took place in a delicatessen on the Lower East Side of Manhattan

* The possession of this heroin by Gallardo, Fabian Rodriguez and Torres was the basis for the charge alleged in Count Twenty of the indictment.

** The possession of one kilogram of heroin received by appellant Fabian Rodriguez and defendant Gilberto Torres was the basis for the charge alleged in Count Twenty-two of the indictment. Indeed the accomplice's testimony relating to Fabian Rodriguez and Torres was corroborated by an undercover police officer who purchased two ounces of heroin from them on November 19, 1975. (Tr. 2502-06, 2628-30; GX 30D1).

and, in both instances, involved the purchase of one-half kilogram of heroin for \$25,000 from appellant Zayas. (Tr. 1336-41).*

Government witness Raymond Valentine, a regular customer of Rossy, also turned briefly to the Gallardo organization when his source of supply of heroin was temporarily interrupted in August 1975. (Tr. 1832-33). During that month, Valentine purchased quarter-kilogram packages of heroin on six different occasions from either defendant Herminio Gutierrez or conspirator Victor Ramirez.** In each instance, Fernando Gallardo dictated the price of the heroin sold to Valentine and received the proceeds of the heroin sales. (Tr. 1833-55).

C. The Defense Case

1. Domingo Zayas

Zayas testified in his own behalf that the testimony of Ramon Rivera and Raymond Rossy was untrue to the extent that it implicated Zayas in the distribution of

* Rossy's testimony was corroborated by that of undercover agent Guzman who accompanied Rossy to Los Angeles in November 1975 while Rossy was cooperating surreptitiously. Guzman testified that after checking into the Dunes Motel in Los Angeles, Rossy and Guzman met with conspirator "Humberto" Ramos-Serrano, from whom Rossy earlier had ordered twenty kilograms of heroin. "Humberto" was then arrested in possession of approximately twenty kilograms of Mexican "brown rock" heroin. (Tr. 1357-61, 1584-88, 1810-12; GX 15). Subsequently, Special Agent George Hoelker of the Drug Enforcement Agency arrested "Hector" Ramos-Irube and seized an additional twenty kilograms of heroin and over \$370,000 in cash. (Tr. 1812-15; GX 15, 18J).

** The delivery of the first quarter-kilogram package of heroin by appellant Anthony Rodriguez to Raymond Valentine in August 1975 formed the basis for the charge contained in Count Twenty-seven of the indictment.

heroin. (Tr. 2685-88). Zayas acknowledged that he had been convicted previously for possession of narcotics.

2. Orlando Machado

Orlando Machado's attorney recited to the jury a stipulation that if Ramon Rivera were recalled as a witness, he would remember having been told that one of the Machado brothers, probably defendant Wilfredo Machado, had gotten sick on a return trip from California. (Tr. 2695). Machado also offered into evidence certified copies of Benito Cruz' criminal conviction records. (Tr. 2695-97; Machado Exh. D, E, F).

3. Carlos Rivera Santiago

Special Agent Andres Amador, of the Drug Enforcement Administration, testified that sometime in the summer of 1976 he participated in the debriefing of government witness Ramon Rivera and prepared the debriefing statement which was later adopted and ratified by Rivera. (Tr. 2701-04). Agent Amador testified that during this debriefing Rivera stated that he had made his fourth narcotics trip to California in the middle of October 1974. (Tr. 2711).

Felix Aponte Salgado, a hardware salesman from Dorado, Puerto Rico, testified that Santiago purchased materials from him in Puerto Rico on October 21, 1974. (Tr. 2729-32). Mr. Salgado identified Santiago Exhibit E as the invoice which he prepared on that date and which he turned over to Santiago one month prior to his testimony at the trial. (Tr. 2730-33).

Bertha Rader, a medical doctor, testified that on November 14 and 21, 1974, she examined appellant Santiago at Bellevue Hospital in New York City, as part of his treatment for a chronic heart ailment. (Tr. 2748-51).

Santiago testified in his own behalf and admitted his friendship with appellant Ramos and conspirator William Cortes-Rios. (Tr. 2758). Santiago denied having met government witness Ramon Rivera, except on one occasion in 1976 in a bar in Puerto Rico owned by Cortes-Rios. (Tr. 2756-57). Santiago further testified that in October 1974 he was in Puerto Rico remodeling his house. (Tr. 2759). Santiago identified Santiago Exhibits F and G as records reflecting, respectively, his visit to a veterinarian in Puerto Rico on October 25, 1974 and his withdrawal of \$2,000 from his savings account in a local Puerto Rican bank on approximately October 30, 1974. (Tr. 2760-63). On cross-examination, Santiago was unable to explain how it was that Ramon Rivera had known Santiago was a member of Local No. 3 of the International Brotherhood of Electrical Workers in the late 1960's. (Tr. 2776-78). In addition Santiago admitted that although he had been seeking to locate documents showing his whereabouts "in October 1974," he had been able to produce such documents only for the dates October 21, 25 and 30, 1974. (Tr. 2792-93).

4. Jose Velasquez

David Vagnetti, an architect, testified that on June 20 and 27, 1974 and August 15 and 22, 1974, Velasquez paid visits to Vagnetti's office in Ponce, Puerto Rico in connection with the proposed construction of a \$50,000 home for Velasquez. (Tr. 2794-2800; Velasquez Exh. B, C).

5. Angelo Roche

Roche introduced into evidence a bill of sale, accompanied by a stipulation that the bill of sale was executed by Roche in Santa Isabel, Puerto Rico on August 12, 1974. (Tr. 2822-23; Roche Exh. A, B).

6. Anthony Rodriguez

Anthony Rodriguez adduced through the testimony of his brother, George, and a clinical abstract from the Beth Israel Medical Center that during 1975 and, more specifically, on August 25, 1975, Anthony Rodriguez was a regular user of heroin. (Tr. 2825-28, 2839-41; Anthony Rodriguez Exh. B).

Appellants Ramos, Morales and Fabian Rodriguez called no witnesses and presented no evidence.

D. The Government's Rebuttal Case

In rebuttal the Government introduced into evidence a court record from the Criminal Court of the City of New York, certifying that on August 24, 1974 bail was posted on behalf of appellant Velasquez in his then-pending state criminal proceeding. (Tr. 2884; GX 34). This evidence established that Velasquez was indeed in New York City in late August 1974 when he first ordered heroin from Ramon Rivera, and not in Puerto Rico as suggested by Velasquez' witness, David Vagnetti.

ARGUMENT

POINT I

The Evidence Established The Single, Massive Heroin Distribution Conspiracy Charged In The Indictment.

Defendant Rume claims that the proof at trial established a series of small conspiracies, and this variance from the single conspiracy charged in the indictment requires reversal of his conviction. The other appellants raise this claim to the extent that each appellant joins

in the issues raised by the other appellants. A review of the applicable law and evidence clearly demonstrates that the jury was justified in finding that the Government had proved the existence of a single, massive conspiracy to distribute hundreds of kilograms of Mexican "brown rock" heroin in New York City.

As this Court has repeatedly and recently observed, the issue on appeal is whether the evidence viewed in the light most favorable to the Government was sufficient to permit a properly charged jury to find a single conspiracy. *United States v. Stirling*, Dkt. No. 77-1140, slip op. 1401 at 1448-49 (2d Cir., Feb. 2, 1978); *United States v. Taylor*, 562 F.2d 1345, 1351 (2d Cir.), cert. denied, 97 S. Ct. 2958 (1977); *United States v. Armesto-Sarmiento*, 545 F.2d 785, 789 (2d Cir. 1976), cert. denied, 430 U.S. 917 (1977). In the instant case the jury clearly was instructed properly on the multiple conspiracy issue because Judge Broderick fashioned his jury instructions on those explicitly approved by this Court in *United States v. Tramunti*, 513 F.2d 1087 (2d Cir.), cert. denied, 432 U.S. 832 (1975) and *United States v. Bynum*, 485 F.2d 490 (2d Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974). Indeed, the one defendant who specifically discusses the multiple conspiracy issue in his brief concedes that the trial court properly submitted the question to the jury. (Roche Br. 21).

As a factual matter, the record contained overwhelming evidence to support the jury's finding of a single conspiracy. As the foregoing discussion and Statement of Facts make clear, the evidence illustrated a structured network of heroin suppliers and dealers which distributed massive quantities of Mexican "brown rock" heroin in New York for a two-year period. The very scale of the conspiracy's operation was sufficient for the jury to infer each defendant's awareness of the entire venture, including its vertical and horizontal scope. See, e.g., *United States v. Magnano*, 543 F.2d 431, 434 (2d Cir. 1976), cert. denied, 429 U.S. 1091 (1977); *United States v. Miley*,

513 F.2d 1191, 1206-07 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975). Moreover, the proof established that the defendants on trial dealt directly with a top distributor designated by Gallardo,* acted themselves as multi-kilogram distributors,** or flew to California to bring suitcases of heroin to New York.*** No defendant in this case dealt in less than quarter-kilogram quantities of heroin.

Thus, the testimony from numerous witnesses including three high level participants—Ramon Rivera, Benito Cruz, and Raymond Rossy—revealed a typical, albeit massive, chain conspiracy, where the conspirators in California imported the heroin, sold it to Gallardo's couriers such as appellants Machado and Zayas, who in turn distributed the heroin to wholesalers such as Rivera and Cruz, who in turn distributed that product for future sale to other wholesalers such as appellants Ramos, Santiago, Roche, Velasquez, Morales, Fabian Rodriguez, and Anthony Rodriguez. All wholesalers, couriers, and distributors worked for a core group controlled by Gal-

* Appellants Ramos, Roche, Velasquez and Morales each repeatedly purchased heroin from courier Ramon Rivera in late summer and fall of 1974; appellant Fabian Rodriguez purchased one and one quarter kilograms of heroin directly from Fernando Gallardo in December, 1974, and purchased one kilogram in January 1975 from Benito Cruz while Cruz was temporarily directing the operation at Gallardo's behest; appellant Ramos purchased heroin not only from Ramon Rivera who sold to other appellants, but also from Benito Cruz who supplied heroin to two other appellants—Fabian Rodriguez and Anthony Rodriguez. Furthermore, appellant Anthony Rodriguez delivered the drug on behalf of Herminio Gutierrez, one of Gallardo's top lieutenants, in August, 1975.

** Appellants Ramos and Santiago distributed all the heroin which courier Ramon Rivera brought to New York from his fourth trip to California in October, 1974.

*** Appellant Orlando Machado acted as a courier in January, 1975; appellant Zayas did so in February, 1975.

lardo and his assistants—his wife, Martha Machado, and his brother Carlos Gallardo. Gallardo organized the trips to California to pick up quantities of heroin ranging up to twelve and one-half kilograms at a time, and the proceeds from the sales made by appellants Ramos, Santiago, Roche, Velasquez, Morales, Fabian Rodriguez, and Anthony Rodriguez were paid to Gallardo or one of his assistants—Martha Machado or William Cortes-Rios.

Appellant Roche's attempt to carve the proof at trial into four or five independent conspiracies is entirely without foundation. In basing his analysis on the limited shifts in the membership of the conspiracy over its two-year existence, he overlooks the indisputable proposition that "conspiracies are often agreements in flux, and a single conspiracy is not transposed into a multiple one simply by lapse of time, change in membership, or a shifting emphasis in its locale of operations." *United States v. Armedo-Sarmiento*, *supra*, 545 F.2d at 790 (citations omitted). Whatever changes in personnel the conspiracy underwent, it is evident, as it was in *United States v. Moten*, 564 F.2d 620, 25 (2d Cir. 1977) that "[t]he point is that [Gallardo] was obviously the kingpin of a single conspiracy regularly dealing with an established cast. His activity was central to the involvement of all" And it simply strains credulity for Roche to contend, in the face of his acknowledgment that he purchased one-half kilogram packages of heroin from the same Gallardo distributor on four separate occasions (Roche Br. 19), that he was unaware of the scope of the conspiracy of which he took such profitable advantage. Indeed the other appellants make no effort to explain why they are not part of a single overall conspiracy.

Finally, Roche's reliance on *United States v. Miley*, 513 F.2d 1191 (2d Cir.), *cert. denied*, 423 U.S. 842 (1975) and *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975) is misplaced. In *Miley* this Court observed that the proof concerning the sale of do-

mestically produced LSD and PCP failed to establish that the core group conducted a regular business. In the instant case the core group of Gallardo, Rivera, Cruz, and appellants Machado and Zayas regularly purchased kilogram quantities of heroin from the *same* supplier and regularly distributed the heroin to many wholesalers including the seven other appellants. Furthermore, the kilogram quantities sold and purchased by the appellants belies any claim that they did not realize that others were likewise buying heroin from a common source. In *Bertolotti* this Court found a series of separate conspiracies not involving the sale of substantial quantities of heroin, but a series of "ripoffs" and thefts. The Court was concerned that certain defendants were prejudiced by the proof of other criminal and reprehensible acts having nothing to do with that defendant's involvement in a narcotics conspiracy.

The facts here are in marked contrast to those in *Miley* and *Bertolotti*. Here the Gallardo organization was a classic manifestation of the narcotics distribution networks all too familiar to this Court. As such, it naturally was strengthened by the "mutual interdependence" inherent in its structure. *United States v. Bynum*, 485 F.2d 490, 495 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States v. Moten*, *supra*, 564 F.2d at 625. Each of the appellants benefitted from the scale of the operation and its responsiveness to a single leadership group. Thus, occasional arrests of conspirators, including Gallardo himself, could be absorbed without interruption of distribution of the "brown rock" drug; and participants were able to shift roles within the conspiracy—from courier to distributor, for example—to avoid the risk of exposure imposed on one who engages repeatedly in the same suspect activity. Finally, the scale of the conspiracy permitted the leaders to purchase

heroin in bulk quantities from the California source, thereby assuring both a continuity of supply and a reduction in price for the wholesalers.

Marked by a common source of supply, a central, unchanging leadership, and a remarkable consistency and interdependence of operation, the Gallardo organization constituted a single combination of traffickers in massive amounts of narcotics. *See, e.g., United States v. Moten, supra*, 564 F.2d at 625; *United States v. Taylor, supra*, 562 F.2d at 1351; *United States v. Arredo-Sarmiento, supra*, 545 F.2d at 789-90. Moreover, the instant conspiracy focused on one neighborhood of one city—the Lower East Side of New York—in distributing its heroin for enormous profits.*

POINT II

The Defendants Were Not Prejudiced By A Joint Trial.

The defendants contend that the joint prosecution of nine defendants, combined with the length of trial and the volume of evidence, denied them a fair trial. This claim should be rejected.**

* Proof of the single conspiracy is therefore even more compelling in this case than others in which the jury's determination has been upheld, including *United States v. Moten, supra* 564 F.2d at 625 (conspiracy to sell cocaine and heroin in Florida, Illinois, Washington, D.C. and New York) and *United States v. Taylor, supra*, (conspiracy in New York and Washington, D.C.).

** This Court has rejected similar claims that the mere number of defendants or the length of the trial should compel separate trials. *United States v. Moten, supra* (33 indicted; 22 tried); *United States v. Stromberg*, 268 F.2d 256 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959) (46 indicted; 19 tried); *United States v. Aviles*, 274 F.2d 179 (2d Cir. 1960) (37 indicted; 17 tried); *see also United States v. Tramunti, supra* (32 indicted; 18 tried).

In *United States v. Moten*, 564 F.2d 620, 627 (1977) this Court articulated the relevant standard in determining whether a defendant is entitled to a severance or, after conviction, to a new trial when he contends that the mere number of defendants on trial deprived him of a fair trial:

"Rather, the inquiry must be whether the defendants in this case were afforded a fair trial. Was the jury reasonably able to consider the evidence as to the guilt of each, independent of the evidence as to guilt of his fellow defendants. Have the defendants been able to establish, as they must, that failure to sever prejudiced their right to a fair trial."

Viewed against this standard the defendants received a fair trial, and Judge Broderick did not abuse his discretion in refusing to grant a severance.*

This joint trial of nine defendants involved a simple and straightforward narcotics conspiracy in which a properly instructed jury had no difficulty in determining the guilt or innocence of a particular defendant based on the evidence admitted against that defendant. As this Court has recently noted, a narcotics conspiracy prosecution such as this one

* While the defendants' briefs do not argue in terms of a severance, their claim is essentially that the District Court erred in not granting a severance. A motion for severance is addressed to the sound discretion of the District Judge, *Opper v. United States*, 348 U.S. 84, 95 (1954); *United States v. Stirling*, *supra*, slip op. at 1449-50, and absent a clear showing of an abuse of that discretion a denial of a severance motion will not be reversed. *United States v. Taylor*, *supra*; *United States v. DeSapio*, 435 F.2d 272, 280 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

"[is] not an antitrust or securities fraud case involving esoteric theories of law and complex business transactions beyond the ken of the ordinary juror. The purchase and sale of hard drugs is basically a simple operation, easily understandable" *United States v. Moten, supra*, 564 F.2d at 627.

Indeed, as in *Moten*, the case turned on the credibility of the witnesses. The jury was not asked to—nor did they need to—infer the participation of each defendant, for one or more of the three central witnesses testified to personal dealings in brown rock heroin with eight of the defendants, and a fourth witness supplied first-hand evidence as to the ninth defendant. The balance of the trial consisted largely of the Government's effort to corroborate the testimony of these witnesses through additional witnesses and exhibits. The jury was not presented with the difficult task of scrutinizing complex financial dealings and relationships in order to determine the legality of particular transactions and the extent to which a particular defendant was involved in that transaction. Rather the jury simply had to decide if a Government witness was telling the truth when he testified to the uncomplicated fact that he sold or bought heroin to or from a particular defendant.

Indeed, the trial proved sufficiently straightforward that all defense counsel concurred in requesting the District Judge to dispense with his proposal to marshal the evidence in his charge to the jury. (Tr. 2579). The Court, which had indicated that marshaling appeared unnecessary because of the expeditious presentation of the proof (Tr. 2578), abided by the wishes of the de-

fense not to marshal the evidence.* This joint and incontestably proper determination of the Court and defendants is perhaps the most powerful demonstration that the evidence at trial posed no unusual challenge to the capacity of the jury.**

The jurors' independent evaluation of the evidence against each defendant was assured by the emphasis placed upon that principle in the Court's clear and comprehensive instructions. The District Judge repeatedly required the jury to consider each defendant individually—indeed, he drove that point home no fewer than nine times in the course of his instructions.*** Finally, he concluded the charge by asking each defendant and his attorney to stand in turn, as he called their names to

* The statement in Roche's brief that he was prejudiced by the District Court's failure to marshal the evidence is astounding. (Roche Br. 21). Judge Broderick specifically asked if any defendant wanted the evidence marshaled. Neither Roche nor any defendant indicated in any way that he wanted the evidence marshaled. (Tr. 2577-79). Under these circumstances it was proper for Judge Broderick not to marshal the evidence. See *United States v. Armedo-Sarmiento*, *supra*, 545 F.2d at 790.

** Contrary to the intimation in the appellants' briefs, this was not an unusually long trial. Although some six weeks passed from the start of jury selection until verdict, the evidence was presented in only fourteen trial days. The balance of time largely was accounted for by the four-day week trial schedule, three days of jury selection, two days of summations and two-and-one-quarter days of deliberations by the jury. With fewer than three weeks of proof, the trial presented a much less substantial challenge to the capacity of the jurors than cases requiring up to fourteen weeks of juror attention. See, e.g., *United States v. Moten*, *supra*; *United States v. Armedo-Sarmiento*, *supra*.

*** See Joint Appendix at 506A, 251A, 537A, 559A, 560A, 564-65A, 568A, 603A, and 604A.

the jury. (Jt. App. 604A). Thus, Judge Broderick's instructions insured that the jury would focus upon the evidence or lack thereof as to each defendant. See *United States v. Corr*, 543 F.2d 1042, 1053 (2d Cir. 1976); *United States v. Papadakis*, 510 F.2d 287, 300 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975).

The Court throughout the trial demonstrated its scrupulous regard for the defendants' right to have the trier of fact evaluate the evidence against each individually. The course of the jury's deliberations establishes that the Court was effective in safeguarding that right. The jury submitted eleven notes to the Court posing questions concerning the evidence at trial. Of these notes, eight requested the reading of testimony specifically relating to six of the nine defendants.* Two of the remaining notes asked that only testimony directly applicable to the defendants on trial be provided.**

* The notes read as follows: "All testimony relating to Angelo Roche and counts 5, 11, 12" (Court's Exh. 7; Tr. 3605-06); "Testimony re: those who testified giving Jose Velasquez heroin. Testimony all undercover agents" (Court's Exh. 8; Tr. 3607); "Can we please see the papers that were found in the car in Puerto Rico" (relating only to appellants Roche and Velasquez) (Court's Exh. 10; Tr. 3640); "We would like to hear the testimony of the doctor and we would like to see the book of the vet; also the invoice for the hardware store of Carlos Rivera-Santiago" (all relating to the alibi defense of appellant Santiago) (Court's Exh. 14; Tr. 3669); "We would also like the testimony of Carlos Rivera-Santiago and the cross-examination and the re-cross-examination by both government and defense attorneys" (Court's Exh. 15; Tr. 3670); "We would like to hear the testimony against Fabian Rodriguez" (Court's Exh. 17; Tr. 3684); "Testimony with respect to search of Morales, including government exhibits of all seized items in his apartment" (Court's Exh. 18; incompletely transcribed at Tr. 3684); and "The previously requested testimony of Antonio Morales is not requested" (Court's Exh. 19; Tr. 3694).

** These notes read: "Can we dispense with agents' testimony which does not apply to the defendants, please?" (Court's Exh. 11; Tr. 3648-49); "We would like the testimony as it relates to the defendants only" (Court's Exh. 13; Tr. 3669).

This pattern of deliberations, as revealed by the notes, illustrates that the jurors carefully considered each defendant individually, just as the Court had instructed them to do. Moreover, the jurors' insistence on not hearing the testimony relating to co-conspirators not on trial establishes that the jury properly distinguished between the conduct of the defendants on trial and that of their co-conspirators.

Defendants have seized upon a single, inartfully drafted note as the sole basis of their claim that the jury was confused. This reliance is completely misplaced.* In light of the clearly focused deliberations disclosed by the other ten notes, the inference defendants seek to draw from a single ambiguous message taken out of context is wholly unwarranted. And, of course, to the extent some of the jurors may have misrecalled the evidence at the time that note was submitted, the reading of the testimony in response to the note undoubtedly refreshed their understanding of the evidence.

The simple fact is that the defendants are unable to demonstrate the specific prejudice which is required to overturn the verdict of the jury. *See United States v. Moten, supra*, 564 F.2d at 628. They have offered no

* That note, the third received by the Court, called for "Testimony of undercover agents who found heroin on seven of the defendants, not except Angelo, The Old Man, and from whom the agents bought heroin." (Court's Exh. 9; Tr. 3622-23). The Court decided to respond to this concededly ambiguous request (one defendant on trial, Antonio Morales, was arrested in possession of heroin, two defendants on trial, Jose Velasquez and Fabian Rodriguez, sold heroin directly to undercover agents, and heroin was purchased by police officers from three other defendants not on trial, Gilberto Torres, Moises Maldonado and Victor Medina (Tr. 1535-40, 2459-68, 2472-74, 2502-06, 2628-30; GX 10, 30D1)—by having the testimony of all undercover officers read to the jury. (Tr. 3643). That course led to the subsequently received notes, reproduced in the immediately preceding footnote, asking that the testimony be limited to that relating to the defendants on trial. Any confusion was thus dispelled by the subsequent notes clarifying the scope of the testimony requested.

concrete allegation of any adverse effect caused by the Government's procurement of a joint indictment.* Instead, their claim reduces itself to a complaint that evidence was received at trial demonstrating the substantial scale of the conspiracy in which they were willing and active participants. Defendants completely overlook the point—dispositive of their claim—that the same proof of the conspiracy charged would have been admissible in separate trials of each of the nine defendants.** Thus this case is entirely different from *United States v. Bertolotti*, 529 F.2d 149 (2d Cir. 1975) where the proof of violent actions by one defendant would not have been admissible at separate trials because this Court found that multiple conspiracies existed.***

* Indeed, the only specific prejudice which arose from the presence of the nine defendants at trial was suffered by the Government: one defendant, Fabian Rodriguez, took advantage of the presence of his co-defendants by continually changing the location in which he was seated when Benito Cruz, the chief witness against him, was on the witness stand. (Tr. 2152-53, 2158). As a consequence, the witness was temporarily unable to identify Fabian Rodriguez. (Tr. 2119-20, 2165-66).

** As this Court noted in *United States v. Stromberg*, 268 F.2d 256, 266 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959):

"... we must not lose sight of the fact that the difficulties which the appellants envisage stem from the number of conspirators rather than the number of defendants on trial. The same evidence would have been admissible similarly subject to connection and the same problems would have arisen if each of the appellants had been tried separately. In the one situation as in the other, the number of conspirators would have been the same. * * * And of course conspirators are not entitled to immunity merely because there [sic] number is great. * * * Indeed, broadly considered, the large conspiracies are potentially more dangerous than the small ones."

*** Defendants' reliance on *United States v. Variano*, 550 F.2d 1330 (2d Cir.), *cert. denied*, — U.S. — (1977) and *United States v. Branker*, 395 F.2d 881 (2d Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969), to establish prejudice from the admission of proof of the conspiracy and the conduct of co-conspirators is

[Footnote continued on following page]

Accordingly, this is not a case in which one defendant was affected by inflammatory evidence which was admissible solely against a co-defendant, or in which the proof against one or two defendants on trial overshadowed that offered against the remainder. The case turned on the jury's evaluation of *the credibility of the witnesses*. The trial proceeded in orderly and efficient fashion. The jury deliberated calmly and intelligently. There is no ground for a claim that the trial was somehow unfair, or that any defendant was denied due process of law.

POINT III

The Assistant United States Attorney's Summation Was Entirely Proper.

Defendants claim that the Government improperly buttressed the credibility of its accomplice witnesses by remarking in rebuttal summation that the jury should acquit the defendants if it concluded that a government prosecutor or agent had suggested to the Government witnesses whom they should implicate in their testimony. (Tr. 3391).^{*} This claim properly was rejected by the

wholly untenable. Both *Variano* and *Branker* involved the difficult posture, emphatically not present here, in which a conspiracy charge had been withdrawn by the Court from the jury's consideration.

^{*} Specifically, defendants claim that the following excerpt from the Government's rebuttal summation was improper:

"But perhaps more fundamental to the charge that the government in this case has put the suggestion into the government's witnesses whom they should testify against, that somehow an agent of the federal government has decided that he will try and obtain the conviction of innocent people by putting the names of innocent people into the mouths of government witnesses, if you think that I, if you think that Mr. Ziegler or any other federal

[Footnote continued on following page]

District Court, inasmuch as the Government's rebuttal was merely a proper response to repeated defense charges that the testimony of the accomplice witnesses was fabricated and programmed.

During their examinations of the Government's witnesses and in their summations, the defense attorneys repeatedly sought to discredit the testimony of the Government's witnesses as fabricated. The four principal accomplice witnesses were repeatedly cross-examined about the length of time they had spent being prepared to testify by Assistant United States Attorneys (Tr. 454-57, 1496-97, 1868-70, 2236-38) and other government agents. (Tr. 585, 656-58, 2234-36, 2701-04). One of these witnesses was questioned about his "deal" with the Government, including his receipt of a stipend from the United States Marshal's Witness Protection Program (Tr. 670, 704) and his sentence to probation while some of his conspirators had been sentenced to terms of imprisonment. (Tr. 643-44, 663). One defense attorney asked another government witness whether he had testified falsely at a prior trial "because you thought the United States Attorney wanted you to lie." (Tr. 1410).

In summation, defense attorneys continually characterized the Government's witnesses as "liars," "perjurers" and "con men" (Tr. 3098-3100, 3111-12, 3138-42, 3146-49, 3180, 3226, 3271A, 3288, 3304, 3307, 3341-43), who were beholden to the Government and were well-prepared to testify (Tr. 3155, 3191), who had bought

agent would jeopardize his or her career beyond a reasonable doubt to convict these people by doing such a thing, then take about 30 seconds in your deliberations; if you think that is what happened here, come back in 30 seconds and acquit every one of them: if that is what this case is about and you think that is what this case is about, you have no business taking any more time than 30 seconds." (Tr. 3391)

their way out of jail and "sold the Government a bill of goods" (Tr. 3106, 3145-46, 3225, 3289, 3294, 3304, 3341-43, 3346-47, 3356), who were making a living testifying and were being "fed and cared for by the Government" (Tr. 3181-82, 3271), and who were naming as conspirators people, including the defendants, whom "the Government would be quick to believe" were criminally involved. (Tr. 3225). Defendant Morales' attorney told the jury that the Government was trying to obtain convictions by using perjured testimony (Tr. 3272). Defendant Zayas' attorney likened the prosecution and its witnesses to "devils", spinning deceit from half-truths. (Tr. 3332-32a, 3356). Defendant Machado's attorney argued that the government witnesses were desperately looking for "the keys to the cage," and knew that "they let you out of jail so long as you tell them 'someone else did wrong'." (Tr. 3145-46). Finally, the trial attorney for defendant Roche presented to the jury an elaborate, hypothetical scenario in which the name of his client was planted in the mind of government witness Ramon Rivera by an unidentified government agent; the clear import of his summation was that the government agent had suggested to Rivera that he implicate Roche. (Tr. 3182, 3192-94).*

* A portion of Roche's summation was as follows:

"Rivera, not a single day in jail; probation. He is being fed and cared for by the government. That is the type Mr. Moss brought as a witness against my client."

* * * * *

"Let's go to that conversation between Mr. Roman, Detective Roman, and Mr. Velasquez some time in the spring of 1973 at the bar in which Mr. Roman was trying to buy some narcotics from Mr. Velasquez and Mr. Roche was standing within touching distance but without taking any part in the conversation.

Why do I ask your attention? Because these might be the genesis, this might be the origin of Mr. Roche's problems. This might be the reason for Mr. Roche having to sit there for weeks and weeks standing trial in which he should not be.

[Footnote continued on following page]

In view of defendants' strategy—evidenced by the cross-examination of Government witnesses and the summations—to convince the jury that the Government had participated in a "frame-up" of the defendants, the Government was entitled to reply to this accusation. *United States v. Benter*, 457 F.2d 1174, 1176-77 (2d Cir.), *cert. denied*, 409 U.S. 842 (1972).^{*} Clearly, "[i]n the

Why?

You heard Rivera, he had long conversations, hours conversations, days interviews with the agents. Many names were asked for him, many names were asked of him. All the information he knew was asked of him. Many agents did interview him.

Imagine, imagine a scene like this:

'Do you know Jose Velasquez?' agents asking Mr. Rivera.

'Yes, I know him.'

'Had you narcotics dealing with him?'

'Yes, I did.'

'Do you know a man by the name of Angelo Roche? He's a neighbor. He used to live in the vicinity of 9th Street. He's an old man, 47 or 50. He's somewhat bald, he's dark-skinned, he is Puerto Rican and he used to own a grocery store.'

He call him Angelo.

'Yes, I know him.'

'That man, do you know anything about? That man once was present in a conversation between Agent Roman of the New York Drug Task Force and Jose Velasquez.'

'How is that?'

'Well, Jose Velasquez and Roman were talking drugs and he was there.'

'I know him. He was one of my clients. Now that you said, he was one of my clients. I recall his name as Angelo.'

'What else do you know about him?'

'Well, Angelo, Angelo The Old Man,' because that is the name by which Raymond Rivera identified Angelo Roche, Angelo the Old Man, not his full name.' (Tr. 3182, 3192-94).

^{*} In *Benter*, this Court held that in light of defense counsel's insinuations that the defendant had been framed by the Government's witnesses, it was not improper for the prosecutor to comment as follows:

[Footnote continued on following page]

context of the trial and balanced against the tactics of the defense lawyers," the comment of the Assistant United States Attorney in summation was a permissible and subdued attempt "to offer a rebuttal to the attacks made directly against his witnesses and directly or indirectly against his office." *United States v. Tramunti, supra*, 513 F.2d at 1119. This Court has consistently held that the prosecutor can respond to the charge in a defendant's

"... [if the jury thinks] for one minute that this is a frame, that the United States Attorney's Office and the FBI got together with the so-called four crooks and paraded them in here to frame this defendant, you should acquit him."

* * * * *

"... if [the government's accomplice witnesses] all got together with us, and I mean the United States Attorney, and with the FBI, to frame [the defendant], well, then go ahead and acquit him." (457 F.2d at 1176).

The Court in *Benter* concluded that these remarks were invited by the defendant's argument in summation that government witnesses had lied to protect themselves from prosecution:

"[This defense argument] insinuated that there was an agreement between the Government and Chervin and Migdal for them to testify and, by implication, the plentiful references to the Government's witnesses being 'crooks' and 'poor liars' constituted a charge that there was a 'frame' of the defendant. To this argument by inference the Government was entitled to reply..." 457 F.2d at 1176-77.

The Court went on to contrast the prosecutor's remarks quoted above with other remarks in his rebuttal summation in which he referred to the defendant sarcastically as "Honest Phil." These latter remarks, viewed by the Court as "a horse of a different color," were held nonetheless to be harmless error. 47 F.2d at 1177. Significantly, in the instant case, the Assistant United States Attorney directed no epithets of any kind at the defendants, nor did he express any personal opinion concerning the truthfulness of any of his witnesses or the guilt of any defendant—see *United States v. Risco*, 549 F.2d 264, 274 (2d Cir.), cert. denied, — U.S. —, 1977— even though counsel for Roche did so by arguing that the conviction of his client would constitute "the greatest injustice I have ever seen in my life as a lawyer." (Tr. 3204).

summation that the defendant had been framed. See *United States v. Stassi*, 544 F.2d 579, 585 (2d Cir. 1976), *cert. denied*, 430 U.S. 907 (1977); *United States v. Estremera*, 531 F.2d 1103, 1110 (2d Cir. 1976); *United States v. Tramunti*, *supra*; *United States v. Santana*, 485 F.2d 365, 370 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). This was precisely what the prosecutor did in the instant case, and the claim that the defendants were prejudiced by the prosecutor's response should be rejected.

POINT IV

Defendants' Other Claims of Error Are Meritless.

A. The District Court and the Government Acted Properly to Cure a Misidentification of Orlando Machado

Orlando Machado claims that he is entitled to a new trial because Ramon Rivera, a Government witness, initially misidentified Machado as a person to whom Rivera had sold heroin, and that this misidentification by Rivera prejudiced Machado. Once the complete facts relating to this claim are stated, it is apparent that Machado's contention is without merit.

During the trial Ramon Rivera identified the defendant Orlando Machado as an individual to whom Rivera had sold heroin. (Tr. 329). As was made clear on the record and to defense counsel at the time, the Government did not know in advance of trial that Mr. Rivera would identify the defendant Machado as someone to whom he had sold heroin. It was only during a discussion between the prosecutor and the witness after the trial had begun and Ramon Rivera had had the opportunity to see the defendants in the courtroom, that the Government learned that Rivera believed he had sold heroin to Orlando Machado. (Tr. 518, 528). At that time the prosecutor

believed Mr. Rivera's recollection was accurate (Tr. 528-29), and the testimony in question was elicited the following morning. (Tr. 329).

The Assistant United States Attorney learned shortly after the witness had testified that the identification of Orlando Machado might have been erroneous. During a luncheon recess, Mr. Rivera identified a photograph of defendant Machado's brother, also known as Ferde, as the purchaser of the heroin. The Government promptly advised Machado's attorney of this event (Tr. 447), and thereafter substantial steps to cure the misidentification were taken. These steps included the re-direct examination of Rivera by the Government (Tr. 1034-1040), a separate representation made to the jury by the Government (Tr. 1034-40),* and Judge Broderick's instruction to the jury at the conclusion of Rivera's testimony that

"Mr. Rivera . . . identified Orlando Machado as being a man named (sic) that he knew as Ferde Machado, with whom he testified he had drug dealings. The government has represented to you that this was a misrepresentation, and so far as you are concerned in considering this case you are to disregard completely the testimony of Mr. Rivera which identified Mr. Orlando Machado as a person with whom he had drug dealings." (Tr. 1140-41).

* On re-direct the government elicited that the witness had on prior occasions identified certain photographs as depicting the "Ferde" with whom he had dealt. The Government then represented that the photographs were of Felix Machado, also known as Ferde, and not the defendant Orlando Machado. (Tr. 1034-40). The Court also conducted a hearing, outside the jury's presence, at which defense counsel was permitted to examine Mr. Rivera on his previous photographic identification. (Tr. 757-96).

Orlando Machado stood during these remarks so the jury clearly understood to whom the Court referred. (Tr. 1141).*

It is apparent that Orlando Machado suffered no prejudice by Rivera's misidentification. Since the Government clearly informed the jury that Rivera had misidentified Machado, and the Government never suggested that Machado had purchased heroin from Rivera, the misidentification could only have helped the defendant by revealing to the jury that a principal Government witness had testified incorrectly. See *United States v. Jenkins*, 496 F.2d 57, 71 (2d Cir. 1974), *cert. denied*, 420 U.S. 925 (1975). Indeed Judge Broderick commented to counsel that the incident could prove beneficial to the defendants. (Tr. 509-10). Most significantly, defense counsel reached the same conclusion. Mr. Broderick, the attorney for Machado, made the point crystal clear in a letter sent to the Court in connection with the sentencing of Machado:

"Towards the end of the jury deliberations, I advised him [Orlando Machado] that we did not want a mistrial, but rather wished this jury to render a verdict as it would be his best chance of acquittal. In a re-trial, there would not have been a misidentification." (Jt. App. 702A).

Surely Machado cannot seriously contend that he is entitled to a new trial because he was the beneficiary of the misidentification.**

* Moreover, in his charge to the jury at the conclusion of the case, the District Court again instructed that the jury was "to disregard that testimony. . . . It is just as if Mr. Rivera had never mentioned Orlando Machado." (Jt. App. 534-35A).

** Incredibly Machado claims on appeal that the Government acted in a "contumacious" manner in not disclosing the misidentification during pretrial discovery. There had not been a misidentification prior to the trial, and the Government did not know until the trial had begun that Rivera believed he could

[Footnote continued on following page]

B. The Government Did Not Violate Its Discovery Obligations to Santiago.

Carlos Santiago interposed an alibi defense to the charge alleged in Count Eighteen that he and two other defendants distributed two and one-half kilograms of heroin in New York City "in or about October 1974." Santiago introduced three documents into evidence which he claimed demonstrated that he was in Puerto Rico on October 21, 25 and 30, 1974. (Santiago Exh. E, F, G). In addition, Santiago attempted to enlarge the scope of his alibi to cover the entire month of October 1974 by testifying that he had been in Puerto Rico remodeling his home throughout that period of time. (Tr. 2759, 2764). Obviously from its verdict, the jury did not believe this testimony. Santiago now claims on appeal that his inability to establish a tighter alibi was the result of improper conduct by the Government in discharging its discovery obligations. (Jt. Br. 23-28). Not only is the factual basis for this accusation misleadingly presented, but there is no legal support for Santiago's extravagant claims.

Pursuant to the pretrial request of Judge Broderick that the Government and defense counsel attempt to work out discovery matters at informal conferences, and, pursuant to an informal request by Santiago's attorney for particulars as to the offense alleged in Count Eighteen, the Government advised counsel on April 14, 1977 of all of the facts in its possession concerning the particular distribution of heroin charged in Count Eighteen. The

identify Machado as a heroin dealer. Thus, the Government had no information to disclose pretrial. Once the Government realized that a misidentification had occurred during the trial, the Assistant United States Attorney took the steps necessary to correct the witness's mistake. The claim that the prosecutor acted improperly is without any foundation.

Government stated its *belief* that the distribution took place over a two-week period in October 1974, *probably* during the latter two weeks in the month. Santiago's counsel was warned, however, that this latter particularization was merely a surmise on the Government's part, and that it was also possible that the distribution occurred during a different two-week period in October 1974. On May 17, 1977, the Government served upon Santiago a demand for a notice of alibi pursuant to Rule 12.1, Fed.R.Crim.P. In this demand, the Government specified the locations in New York City where it claimed the distribution alleged in Count Eighteen had occurred and reiterated its belief that the distribution occurred "in October 1974 (probably during the third and fourth weeks of that month)."

Only on the eve of trial was the Government finally able to pinpoint with certainty the time in which these criminal acts were committed: the first and second weeks in October, 1974. Santiago's counsel was promptly notified of this prior to the start of jury selection on May 23, 1977. At the trial, the Government proved, through the testimony of Ramon Rivera (Tr. 347-69) and the introduction of certain telephone records (GX 8A, 8B), that the distribution of heroin charged in Count Eighteen occurred within the two-week period surrounding the date on which certain telephone calls were made by Rivera: that is, during the first two weeks in October 1974. On June 22, 1977, over four weeks after being notified that this would be the thrust of the Government's proof, Santiago presented his alibi defense.

Thus, it is clear that Santiago's contention that "the Government disclosed incorrect and misleading information" (Jt. Br. 26) is itself misleading. Prior to the start of the trial, the Government made no representations to Santiago's attorney that it knew the precise range of dates on which the criminal acts alleged in

Count Eighteen occurred. If Santiago relied upon the Government's *surmises* and limited his pretrial search for alibi evidence to the third and fourth weeks of October 1974, he clearly did so at his own risk and not through any fault of the Government.*

Moreover, Santiago has failed to show—or even claim—that he was prejudiced in any concrete way by the events he complains of. Significantly, he has never contended that he was unable to conduct a thorough search for alibi evidence in the four week period between May 23, 1977 and June 22, 1977, during which he was aware that the Government's evidence would prove his criminal activity in New York City occurred in the first two weeks of October 1974.** Indeed, even now—nine months after the conclusion of the trial—Santiago has not been able to point to even one item of alibi evidence that might have surfaced had he had a longer period of time to conduct his search. He is simply attempting to lay at the Government's doorstep blame for his own inability to uncover exculpatory evidence, without so much as a suggestion that such evidence ever existed.

C. The District Court Properly Submitted a Copy of the Indictment to the Jury.

Roche contends that it was improper to provide the jurors with a copy of the indictment. Noting that the

* There is considerable doubt from the record that Santiago ever restricted his search for alibi evidence to any narrower period than the one month alleged in the indictment. Santiago admitted during his testimony that he knew the indictment placed his criminal acts "in October 1974" and that he therefore "made efforts to locate documents that would show [his] whereabouts in October, 1974." (Tr. 2792).

** During this four week period, Santiago made at least two trips to Puerto Rico (Tr. 2586), at which times he presumably had ample opportunity to search for alibi evidence.

substantive counts relating to persons not on trial were deleted, Roche nevertheless contends that providing the indictment to the jury was prejudicial. This claim is without merit.

The decision to submit the indictment to the jury was within the sound discretion of the trial court. *United States v. Marquez*, 424 F.2d 236, 240 (2d Cir.), cert. denied, 400 U.S. 828 (1970). In the context of this case, where the jury had to determine the guilt or innocence of nine defendants on a number of counts, it is inconceivable that Judge Broderick's determination that a copy of the indictment could prove useful to the jury was an abuse of his discretion.* Indeed by providing a copy of the indictment to the jury the District Judge helped to insure that the jury would understand which counts were relevant to a particular defendant. Thus, it is difficult to comprehend how Roche can complain that the jury did not extend him individualized consideration and, at the same time, criticize an eminently reasonable step taken by the District Judge to assure that very objective.

Moreover, defense counsel made no objection in principle to Judge Broderick's decision to supply the jury with a copy of the indictment. (Tr. 3471-73).** Defendants should not be permitted to claim on appeal that a District Judge abused his discretion when the District Court was not given an opportunity to rule on the complaint during

* The District Judge clearly instructed the jury that the indictment was not evidence. (Jt. App. 511-12A).

** The only objections relating to providing the jury with the indictment concerned whether the redacted indictment should be renumbered, and whether the overt acts charged in the conspiracy count should be deleted. The District Court chose not to amend the indictment to remove allegations of conduct which had been proven at trial, and decided not to renumber the counts. Roche does not contend that the District Judge erred in these rulings. There was no objection to the principle of providing a redacted indictment to the jury.

the trial. See *United States v. Hockridge*, Dkt. No. 77-1243, slip op. at 14 (2d Cir., March 27, 1978); *United States v. Braunig*, 553 F.2d 777, 780 (2d Cir.), cert. denied, 431 U.S. 959 (1977); *United States v. Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), cert. denied, 383 U.S. 907 (1966).

D. The District Court Responded Properly To An Ambiguous Jury Note.

Defendants contend that the District Judge erred in failing to instruct the jurors that "they were mistaken about the facts" (Jt. Br. 15) in response to an ambiguous note from the jury.* This contention is unsupported.

The District Judge read the note in open court and in accordance with the procedure approved in *United States v. Schor*, 418 F.2d 26 (2d Cir. 1969), sought the views of counsel. (Tr. 3622-3643). The note at issue was written by the jury in response to the Court's request, approved by counsel, that the jury attempt to narrow a previous note requesting all the testimony of undercover agents. (Tr. 3611-12). When the jury's attempt to narrow that request proved ambiguous to the Court and counsel, Judge Broderick decided to respond by complying with the prior broad request for the testimony of undercover agents. (Tr. 3633). While that request was being complied with the jurors interrupted the reading of the testimony responsive to the earlier note with additional notes clarifying and limiting their wishes.**

* The disputed note read as follows:

"Testimony of undercover agents who found heroin on seven of the defendants, not except Angelo, The Old Man, and from whom agents bought heroin." (Tr. 3622-23).

** See Court's Exhibits 11 and 13 (Tr. 3648-49, 3669), reproduced in a footnote on page 25, *infra*.

The Court's disposition of the matter is unimpeachable. As Judge Broderick noted at the time, to the extent the ambiguous note betrayed confusion among the jurors, a reading of the testimony would resolve the problem. (Tr. 3637). There was no need for the District Court to inject its own interpretation of the evidence in the midst of the jury's deliberations.* Furthermore, defendants' assertion that none of the defendants possessed heroin when arrested in this case (Roche Br. 33; Jt. Br. 14) overlooks the fact that one defendant on trial, Antonio Morales, was arrested in possession of heroin and two other defendants on trial, Jose Velasquez and Fabian Rodriguez, sold heroin directly to undercover agents. Moreover, three defendants not on trial—Gilberto Torres, Moises Maldonado and Victor Medina—also sold heroin to undercover agents. Thus, the jury's note did not evidence the total misunderstanding of the case as defendants would want this Court to believe. In any event Judge Broderick's method of dealing with the note would have removed any confusion that may have existed.

The proper response to the jury's note was in the discretion of the trial court. *United States v. Pollak*, 474 F.2d 828, 831-32 (2d Cir. 1973); *United States v. Desist*, 384 F.2d 889, 904-05 (2d Cir. 1967), *aff'd on other grounds*, 394 U.S. 244 (1969). See *United States v. Gentile*, 525 F.2d 252, 260-61 (2d Cir. 1975), *cert. denied*, 425 U.S. 903 (1976). Judge Broderick's determination in this case, reached only after counsel were afforded a full opportunity to comment, was sound and entirely appropriate.

* The decisions relied upon by defendants, *United States v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975) and *Bollenbach v. United States*, 326 U.S. 607 (1946), involve the court's failure to provide a proper instruction on the applicable law to a deliberating jury. The duty of the court to redress a jury's misapprehension of the law has no bearing on the appropriateness of a response to a jury note concerning the facts in the case, which it is the province of the jury to determine.

E. The Sentences Imposed On The Defendants Were Proper.

The defendants contend that the District Court's sentencing procedure was improper because the imposition of fifteen year sentences on seven of the defendants revealed that Judge Broderick followed a mechanical and fixed approach to sentencing without regard to individual mitigating factors. This claim is without legal or factual support.

Preliminarily, it should be noted that the sentences were within the limits provided by the statute and generally are not subject to review in this Court.* *See, e.g., Dorszynski v. United States*, 418 U.S. 424, 431 (1974); *United States v. Brown*, 479 F.2d 1170, 1172 (2d Cir. 1973). Defendants do not claim, nor could they, that the District Court acted on the basis of false information or an improper factor in passing sentence.**

A review of Judge Broderick's diligent efforts prior to and on the day of sentencing makes clear that the District Judge took seriously his responsibilities in imposing sentence. The District Court went far beyond the procedure required by Rule 32(a), Fed.R.Crim.P., by conducting separate "pre-sentence conferences" for each defendant. Initiated by the Court and attended by defense counsel, prosecutor and the probation officer who drafted

* The sentences are set forth at page 3, *infra*.

** Cf. *consequently*, this case does not fall within any exception to the general rule precluding appellate review. *See, e.g., United States v. Ramos*, Dkt. No. 77-1271, slip op. 1575 (2d Cir., February 15, 1978) (sentence may have been affected by improper factor); *United States v. Robin*, 545 F.2d 775 (2d Cir. 1976) (denial of opportunity to contest accuracy of pre-sentence report); *United States v. Stein*, 544 F.2d 96 (2d Cir. 1976) (sentence based on misinformation).

the pre-sentence report, these conferences in chambers enabled each defense attorney to address the contents of his client's pre-sentence report and bring any other information to the Court's attention well in advance of the imposition of sentence. This time-consuming process, not required by a rule or District Court policy, suggests the conscientiousness with which Judge Broderick performed his duty to impose sentence, and belies defendants' claim that the Court followed a "fixed, mechanical approach." (Jt. Br. 31).

The Court indicated at each sentencing proceeding that it had considered the nature of the offense, the testimony at trial, the pre-sentence report, the defendant's criminal record, and the information supplied during the pre-sentence conference. (Jt. App. 611A, 629A, 638A, 644A, 650A, 656A, 664A). The Court also stressed, as was its right, the seriousness of the defendants' crimes. It recognized that "[a] whole community was victimized by the actions of the members of this conspiracy. . . ." (Jt. App. 615A). Despite defendants' contention, however, the District Court did not rely on this factor to the exclusion of all others. The fact is that the Court imposed nine different sentences upon the fourteen members of the Gallardo conspiracy convicted at trial or upon a plea of guilty.*

* Appellants' claim that seven of the sentences were unvarying overlooks the differing terms of special parole provided by the Court, a factor which is significant indeed. *United States v. Alejandro*, Dkt. No. 77-1338, slip op. at 1517 (2d Cir., Feb. 9, 1978). In addition to the five different sentences imposed upon the nine appellants, two of which followed intensive 90-day studies pursuant to 18 U.S.C. § 4205(c), the Court sentenced three of the four defendants who pled guilty, Ricardo Garcia, Luis Rodriguez, and Jose Luis Iglesias, to four years' probation, three years' probation, and five years imprisonment followed by three years of special parole, respectively. The fourth defendant, Wilfredo Machado, was sentenced to the custody of the Attorney

[Footnote continued on following page]

The District Court was entitled to conclude that substantial terms of imprisonment were required for defendants whom the evidence at trial showed, and jury found, were active and willing participants in a massive heroin distribution conspiracy, who themselves repeatedly dealt in substantial quantities of heroin, and whose pre-sentence reports were far from favorable. The Court clearly took the personal backgrounds of each defendant into account, as is evidenced by the lesser terms imposed upon appellants Anthony Rodriguez and Orlando Machado—the former a drug addict at the time of the offense, the latter a man of severely limited intelligence.

Defendants' complaint, naturally spurred by what they perceive to be severe sentences, is that the District Judge attached too much importance to the nature of their crimes, and too little weight to other factors, including an asserted differentiation, not substantiated by references to the proof, in their degrees of culpability. However, it is precisely this type of decision which is commended to the discretion of the District Court, and is not subject to review on appeal. See *United States v. Kaplan*, Dkt. No. 77-1428, slip op. at 1465 at 1466-67 (2d Cir., Feb. 3, 1978).

General for treatment pursuant to the Youth Corrections Act, 18 U.S.C. § 5010, *et seq.*

Apart from the substantial differences in personal background from the appellants, defendants Garcia and Luis Rodriguez voluntarily cooperated with the Government and testified at trial, at not insignificant risk to their safety. The Court was entitled to take such evidence of contrition and rehabilitation into account in passing sentence. *United States v. Sweig*, 454 F.2d 181 (2d Cir. 1972); *United States v. Vermeulen*, 436 F.2d 72 (2d Cir. 1970), *cert. denied*, 402 U.S. 911 (1971).

CONCLUSION

The judgments of conviction should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

JAMES A. MOSS,
RICHARD F. ZIEGLER,
RICHARD WEINBERG,
*Assistant United States Attorneys,
Of Counsel.*

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

RICHARD F. ZIEGLER being duly sworn,
deposes and says that he is employed in the office
of the United States Attorney for the Southern District
of New York.

That on the 3d day of APRIL
19 78, he served a copy of the within Brief for the U.S.A.
by placing the same in a properly postpaid franked
envelope addressed:

TO THE NINE ATTORNEYS LISTED
ON THE TWO ATTACHED SHEETS

And deponent further says that he sealed the said
envelope and placed the same in the mail box for mail-
ing at One St. Andrew's Plaza, Borough of Manhattan,
City of New York.

Richard F. Ziegler

Sworn to before me this
3rd day of April, 1978

Alma Hanson

ALMA HANSON
Notary Public in and for New York
No. 41-6763490
Qualified in Queens County
Commission Expires March 30, 1980

HUGH CONNOR, Esq.
150 NASSAU ST
New York, New York

10038

Kenneth Linn, Esq.
276 Fifth Avenue
New York, New York

10007

JEROME A. LANDAU, Esq.
401 Broadway
New York, New York

ROBERT MITCHELL, Esq.
51 Chambers Street
New York, New York

BONNIE JOSEPHS, Esq.
575 MADISON AVENUE
New York, New York
10022

RONALD D. DEGEN, Esq.
O'ROURKE, MCGOVERN
& DEGEN
233 BROADWAY
New York, New York
10007

MICHAEL P. STOKAMER, Esq.
100 Church Street
New York, New York

THEODORE KRIEGER, Esq.
132 Nassau Street
New York, New York
10038

JOHN J. BRODERICK, Esq.
32 PINE ROAD
SYOSSET, New York
11791